Pejabat Tenaga Kerja Kuching v Number One Indah Sdn Bhd

HIGH COURT (KUCHING) — CASE NO KCH-41–71/11 OF 2011
RAVINTHRAN JC
17 APRIL 2012

Evidence — Burden of proof — Fact especially within knowledge of party in civil case — Company charged for employing foreigners without license — Whether burden of producing license upon company — Whether magistrate misdirected herself on burden of proof — Whether burden on company to prove 'verbal licence' existed during interim period between application for license and rejection of application — Whether notice of appeal to High Court defective for not being signed by public prosecutor personally — Instances where power must be exercised by public prosecutor personally — Evidence Act 1950 s 106 — Criminal Procedure Code ss 306 & 376(3)

The magistrate's court had acquitted the respondent of 14 charges, in five cases tried together, of employing foreign workers without a licence pursuant to s 119(1) of the Sarawak Labour Ordinance ('the Ordinance'). Although the magistrate found the prosecution had proved the workers were foreigners and that they were working in the respondent's premises at the time and place stated in the charges, she held that a prima facie case had not established because the prosecution had failed to produce in court the licence mentioned in the charges. In the instant appeal to the High Court by the prosecution against the magistrate's decision, the respondent argued that (i) the notice of appeal was flawed as it was not signed by the public prosecutor himself but by his deputy and that this was contrary to s 306 of the Criminal Procedure Code ('CPC') which stated that 'When an accused person has been acquitted by a magistrate there shall be no appeal except by, or with the sanction in writing of, the Public Prosecutor' and; (ii) a 'verbal licence' existed in the interim period between the application for the licence and the decision by the Labour Department to reject the application.

Held, allowing the appeal and ordering the respondent to enter its defence to the 14 charges before the magistrate:

(1) The magistrate had misdirected herself. The charge was that the respondent did not possess a licence under s 119(1) of the Ordinance. The prosecution did not bear the burden of producing the licence. It only needed to tender evidence that the workers in question were foreigners and that they were working in the respondent's premises. It was the respondent's duty to produce the licence (s 106 Evidence Act 1950 Illustration (b) ('Act')) (see para 12).

(2) None of the Labour Department officers testified that there was a 'verbal licence'. Section 119(2) of the Ordinance referred to the licence being 'in *such form* … as may be prescribed'. The term such form denoted a written licence as opposed to a verbal licence. Even assuming a 'verbal licence' existed, it was up to the respondent to prove it by virtue of s 106 of the Act by calling witnesses (see paras 13–14).

(3) Section 306 of the CPC did not say the power conferred by it must be exercised personally by the public prosecutor. Section 376(3) of the CPC clearly stated that a deputy public prosecutor may exercise all or any of the rights and powers vested in or exercisable by the public prosecutor by or under this Code except if the power was expressed to be exercisable by the public prosecutor personally such as was found in ss 88(1), 376(2) and 418A(2) of the CPC (see para 5).

(4) As the prosecution had tendered sufficient evidence to support all the ingredients of the offence the magistrate should have ruled that a prima facie case had been established (see para 15).

[Bahasa Malaysia summary

Mahkamah majistret telah membebaskan responden daripada 14 pertuduhan, dalam lima kes yang didengar bersama, mengenai pengambilan pekerja asing tanpa lesen menurut s 119(1) Ordinan Buruh Sarawak ('Ordinan'). Walaupun majistret mendapati pihak pendakwaan telah membuktikan pekerja-pekerja tersebut merupakan orang asing dan mereka bekerja di premis responden-responden pada masa dan tempat yang dinyatakan dalam pertuduhan-pertuduhan, beliau memutuskan bahawa kes prima facie tidak dibuktikan kerana pihak pendakwaan telah gagal untuk mengemukakan lesen yang disebut di dalam pertuduhan-pertuduhan tersebut di mahkamah. Dalam rayuan ini ke Mahkamah Tinggi oleh pendakwa raya terhadap keputusan majistret, responden-responden menghujah bahawa (i) notis rayuan adalah tidak sempurna kerana ia tidak ditandatangani oleh pendakwa raya sendiri tetapi oleh timbalannya dan ini adalah bertentangan s 306 Kanun Acara Jenayah ('KAJ') yang menyatakan bahawa 'Apabila tertuduh dibebaskan oleh majistret maka tiada rayuan boleh dilakukan melainkan oleh atau dengan keizinan bertulis Pendakwa Raya' dan; (ii) satu 'lesen lisan' wujud dalam tempoh interim di antara permohonan untuk lesen dan keputusan oleh Jabatan Buruh untuk menolak permohonan tersebut.

Diputuskan, membenarkan rayuan dan mengarahkan responden untuk memasukkan pembelaannya terhadap 14 pertuduhan di hadapan majistret:

(1) Majistret tersebut telah terkhilaf. Pertuduhan adalah bahawa responden tidak memiliki lesen di bawah s 119(1) Ordinan. Pendakwa raya tidak memikul beban mengemukakan lesen tersebut. Beliau hanya perlu mengemukakan keterangan bahawa pekerja-pekerja yang dipersoalkan

merupakan orang asing dan bahawa mereka bekerja di premis-premis responden. Adalah kewajipan responden untuk mengemukakan lesen tersebut (s 106 Akta Keterangan 1950 Ilustrasi (b) ('Akta')) (lihat perenggan 12).

(2) Tiada seorang pun daripada pegawai-pegawai Jabatan Buruh yang memberi keterangan bahawa terdapat 'lesen lisan'. Seksyen 119(2) Ordinan merujuk kepada lesen tersebut 'dalam borang … seperti yang ditetapkan'. Istilah borang membawa maksud satu lesen bertulis bertentangan dengan lesen lisan. Malah, dengan mengandaikan satu 'lesen lisan' telah wujud, terserah kepada responden untuk membuktikannya menurut s 106 Akta dengan memanggil saksi-saksi (lihat perenggan 13–14).

(3) Seksyen 306 KAJ tidak menyatakan bahawa kuasa yang diberikan melaluinya perlu dilaksanakan sendiri oleh pendakwa raya. Seksyen 376(3) KAJ dengan jelas menyatakan bahawa seorang timbalan pendakwa raya boleh menjalankan semua atau mana-mana hak dan kuasa yang ada atau yang boleh dijalankan oleh pendakwa raya dengan atau di bawah Kanun ini kecuali sekiranya kuasa tersebut dinyatakan perlu dilaksanakan oleh pendakwa raya sendiri seperti yang didapati dalam ss 88(1), 376(2) dan 418A(2) KAJ (lihat perenggan 5).

(4) Memandangkan pihak pendakwaan telah mengemukakan keterangan mencukupi untuk menyokong semua intipati kesalahan, majistret seharusnya memutuskan bahawa kes prima facie telah dibuktikan (lihat perenggan 15).]

Notes

For cases on fact especially within knowledge of party in civil case, see 7(1) *Mallal's Digest* (4th Ed, 2011, Reissue) paras 560–561.

Cases referred to

PP v Joehari Abdullah & Anor [1996] 5 MLJ 324; [1996] 1 CLJ 100, HC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 50
Criminal Procedure Code ss 306, 376(3)
Evidence Act 1950 s 106, 106 Illustration (b)
Sarawak Labour Ordinance (Cap 76) ss 88(1), 119(1), (2), 376(2), 418A(2)

Stephanie ak Riseng (Deputy Public Prosecutor, Attorney General's Chambers, Sarawak) for the appellant.
Desmond Kho (Kho & Partner Advocates) for the defendant.

Ravinthran JC:

INTRODUCTION

[1] The is an appeal by the prosecution against the decision of the learned magistrate who acquitted the respondent of 14 charges in five separate cases for an offence under s 119(1) of the Labour Ordinance (Sarawak, Cap 76). The cases were jointly tried. The respondent was alleged to have employed 14 Bangladeshi workers without a licence on 3 February 2009 which is an offence under s 119(1) of the Labour Ordinance. Save for the name of the employee, all the charges are identical.

PRELIMINARY ISSUE

[2] The preliminary issue that was raised by counsel for the respondent is that the appeal is defective and incompetent for the reason that the notice of appeal was signed by the deputy public prosecutor and not the public prosecutor himself. Counsel for the respondent cited s 306 of the Criminal Procedure Code ('CPC') which reads as follows:

> 306. Appeal against acquittal.
>
> When an accused person has been acquitted by a Magistrate there shall be no appeal except by, or with the sanction in writing of, the Public Prosecutor.

[3] The argument of counsel for the respondent is that the above power must be exercised 'personally' by the public prosecutor and it cannot be exercised by the deputy public prosecutor. To further support his argument, he cited s 50 of the Courts of Judicature Act 1964 ('CCJA') which reads as follows:

> 50. Jurisdiction to hear and determine criminal appeals
>
> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

[4] However, this provision governs appeals from the High Court to the Court of Appeal. It has nothing to do with appeals from subordinate courts to the High Court. Therefore, the issue whether the public prosecutor must personally exercise the power to appeal decisions of subordinate courts has to be answered by reference to the CPC. In my opinion, the power to appeal

conferred by s 306 can also be exercised by the deputy public prosecutor. My reasoning is based on s 376(3) of the CPC which reads as follows:

> 376. Public Prosecutor.
>
> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
>
> (2) The Solicitor-General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney General.
>
> (3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and *may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code* or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors.
>
> (3A) The Public Prosecutor may appoint fit and proper persons to be Assistant Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and, subject to such limitations or restrictions as may be specified by the Public Prosecutor, shall have all the powers of a Deputy Public Prosecutor.
>
> (4) The rights and powers vested in or exercisable by the Public Prosecutor by subsections (3) and 68(2) shall be exercisable by the Public Prosecutor personally, (Emphasis added.)

[5] Section 376(3) clearly states that a deputy public prosecutor *may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code*. The only exception is if the power is *expressed to be exercisable by the Public Prosecutor personally*. Section 306 does not say that the power conferred by it must be exercised 'personally' by the public prosecutor. By comparison a number of provisions in the CPC state that the power of the public prosecutor must be exercised 'personally'. They are as follows:

> 88(1) No prosecution against any Magistrate, police officer or member of the armed forces for any act purporting to be done under this Chapter shall be instituted in any Court except with the sanction in writing of the Public Prosecutor *personally* or, in Sabah or Sarawak, of the Director of Public Prosecutions.
>
> 376(4) The rights and powers vested in or exercisable by the Public Prosecutor by subsections (3) and 68(2) shall be exercisable by the Public Prosecutor *personally*.
>
> 418A(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him *personally*. (Emphasis added.)

[6] The only way to hold that the counsel for the respondent is correct in his reading of s 306 that a deputy public prosecutor is not empowered to file a notice of appeal is to overlook and render otiose the crystal clear words of s 376(3) which permits a deputy public prosecutor to deputise for the public prosecutor. This approach would have the absurd consequence of rendering deputy public prosecutors throughout the country powerless to carry out any prosecutorial duty. I am also fortified in my opinion by the case of *Public Prosecutor v Joehari Abdullah & Anor* [1996] 5 MLJ 324; [1996] 1 CLJ 100. The same objection as in the instant case was raised as preliminary point. Tee Ah Sing JC dismissed the preliminary objection. His Lordship said as follows:

> I am of the view that s 306 of the CPC allows an appeal against an acquittal to be made in two situations. Firstly the public prosecutor can appeal against the acquittal. When the appeal against acquittal is lodged by the public prosecutor no sanction in writing of the public prosecutor is required.
>
> Secondly if the appeal against acquittal is by any other person then the any other person is conferred the right to appeal when there is a sanction in writing of the public prosecutor.
>
> This will arise in a non-seizable case where the complainant is a private person. He may under s 380(ii)(c) of the CPC, appear in person or by advocate and prosecute for an offence against his own person or property.
>
> … Section 306 of the CPC does not expressly state that the right of appeal are to be exercised by the public prosecutor personally.
>
> So by virtue of s 376(iii) of the CPC a deputy public prosecutor can file notice of appeal against an acquittal under s 306 of the CPC and no sanction in writing of the public prosecutor is required.

[7] For all the above reasons, I shall dismiss the preliminary objection and proceed to consider the appeal of the public prosecutor on the merits.

WHETHER PRIMA FACIE CASE ESTABLISHED?

[8] Section 119(1) of the Labour Ordinance which is the offence creating provision reads as follows:

> (1) No person shall employ any non-resident employee unless he has obtained from the Director a Licence to Employ Non-Resident Employee.

[9] The ingredients of the offence in question are:

(a) that the respondent employed a non-resident employee; and

(b) that the respondent did not possess a licence from the director of Labour Department to employ a non-resident employee.

[10] The prosecution called officers from the Immigration Department, insurance companies and the Labour Department to prove its case. PW1, the assistant immigration officer testified that the said 14 workers were employed by the respondent based on the Immigration Department's data system. Two insurance company officers ('PW2 and PW4') testified that seven of the workers had been insured as employees of the respondent. PW5, who is a labour officer, testified that the respondent had submitted an application (*surat kelulusan dasar*) for a licence to employ non-resident employees. She also said that no licence was ever issued to the respondent in respect of the said workers. PW6 who is the assistant director of labour and the investigating officer of the case testified that during an inspection on 3 February 2012, he discovered that the respondent employed all 14 workers without a licence under s 119(1) of Labour Ordinance. Documentary evidence of employment of the said workers and their citizenship status such as punch cards, employee records and passports were tendered in evidence. There was no challenge that the workers were Bangladeshi citizens. It is apparent from the grounds of judgment of the learned magistrate that she was satisfied with the evidence of the prosecution that the 14 workers were Bangladeshi citizens and that they were found working in the premises of the respondent at the time and place stated in the charges. This is what she said in her judgment:

> In this case, no doubt that the 14 individuals referred to in the said charge are Bangladeshi and the prosecution had called the witness who are mainly from the office of the Labour Department and Customs (sic) Department. In this case, the court is satisfied that the 14 Bangladeshi workers were employed by Number One Indah Sdn Bhd based on the documents admitted as evidence by the court.

[11] Although she found that the 14 foreign workers were working at the premises of the respondent without a licence under s 119(1), she ruled that the prosecution had failed to establish a prima facie case. Her sole reason for such a finding can be discerned in the following passage of her judgment:

> … the most important ingredient is that the prosecution must show to the court what is the license issued by the Labour Department which, warrant to an offence under this section in the event of non-approval of director of Labour Department of Sarawak. In this case, two witnesses were called from the Labour Department for their testimony. None of them shown the court with the license mentioned in the charge and during the trial.

[12] In my opinion, this is clearly misdirection. The charge against the respondent was that they did not possess a licence under s 119(1) of the Labour Ordinance. In the premises, the prosecution does not bear the burden of producing the licence. Section 105 of the Evidence Act 1950 should come to the aid of the prosecution.

> 106. Burden of proving fact especially within knowledge.

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A. is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[13] Illustration (b) is clearly applicable to this case. The prosecution only need to tender evidence that the workers in question are foreigners and that they were working in the said premises. It is the duty of the respondent to produce the licence under s 119(1) of the Labour Ordinance. I am mindful of the argument of counsel for the respondent that in the interim period between the application of the licence and decision of the Labour Department to reject the application, there was a 'verbal licence'. However, none of the Labour Department officers testified that there was such a 'verbal licence'. It must be noted that s 119(2) of the Labour Ordinance reads as follows:

(2) The power of the Director to issue a Licence to Employ Non Resident Employee shall be subject to the laws on immigration applicable to Sarawak and such Licence shall be in such form and subject to such conditions as may be prescribed.

[14] The word *such form* denotes a written licence as opposed to a verbal licence. Even assuming that 'a verbal licence' existed, it is up to the respondent to prove it by virtue of s 106 of the Evidence Act 1950 by calling witnesses. At this stage, there is no admission of a 'verbal licence' in the testimony of the Labour Department witnesses. It is only found in the submission of counsel for the respondent. I am also mindful that counsel for the respondent said that adverse inference should have been invoked against the prosecution for not calling Encik Ahmad Lamat, Penolong Kanan Pengarah Tenaga Kerja as he received the application for the licence from the respondent. This submission lacks merit as there is no burden on the prosecution to prove the existence of the licence by virtue of s 106 of the Evidence Act 1950.

[15] In conclusion, as the prosecution had tendered sufficient evidence to support all the ingredients of the offence, the learned magistrate should have ruled that a prima facie case was established. In the premises, I allow the appeal of the prosecution and I order the respondent to enter defence on the said 14

charges. As the learned trial magistrate has been transferred away from the judiciary, I will direct the registrar to arrange another magistrate to continue with this case.

Appeal allowed and respondent ordered to enter its defence to the 14 charges before magistrate.

Reported by Ashok Kumar